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order to show cause

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 THEODORE F. SCHROEDER, *et al.*,

4 Plaintiffs,

5 v.

12 CIV. 9413 (PKC)

6 BRIAN S. COHEN and PINTEREST,

7 Defendants.

8 -----x

9 April 2, 2013
10:30 a.m.

10 Before:

11 HON. P. KEVIN CASTEL,

12 District Judge

13 APPEARANCES

14 MONTGOMERY, MCCracken, WALKER & RHOADS, LLP
Attorneys for Plaintiffs

15 BY: SIDNEY S. LIEBESMAN
16 CHARLES PALELLA
STEVEN PACHMAN

17 QUINN, EMANUEL, URQUHART, OLIVER & HEDGES, LLP
Attorneys for Defendant Pinterest

18 BY: MICHAEL CARLINSKY
19 RACHEL KASSABIAN

20 JENNER & BLOCK
Attorneys for Defendant Cohen

21 BY: ANDREW BART
22 BRIAN FISCHER
23
24
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1 (Case called)

2 THE DEPUTY CLERK: Plaintiff's ready?

3 MR. LIEBESMAN: We are.

4 THE DEPUTY CLERK: Please state your appearance.

5 MR. LIEBESMAN: Sidney Liebesman from Montgomery

6 McCracken, your Honor; good morning.

7 THE COURT: Good morning. It is pronounced Liebesman?

8 MR. LIEBESMAN: Liebesman.

9 THE COURT: Good morning.

10 MR. PALELLA: Charles Palella from Montgomery

11 McCracken as well.

12 THE COURT: All right.

13 MR. PACHMAN: And Steven Pachman from Montgomery

14 McCracken as well.

15 MR. CARLINSKY: Good morning, your Honor. Michael

16 Carlinsky from Quinn Emanuel for Pinterest.

17 THE COURT: Good morning, Mr. Carlinsky.

18 MS. KASSABIAN: Kassabian also with Quinn Emanuel for

19 Pinterest.

20 THE COURT: Good morning, Ms. Kassabian.

21 MR. FISCHER: Brian Fischer from Jenner & Block for

22 Mr. Cohen.

23 THE COURT: Good morning, Mr. Fischer.

24 MR. BART: Andrew Bart from Jenner & Block for

25 Mr. Cohen.

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1 THE COURT: Good to see you.

2 This Court issued an order to show cause on March 15th
3 and supplemented it with a second order on March 18th and let
4 me hear from Mr. Liebesman, Mr. Palella, Mr. Pachman whether
5 they have any further written submission that they, as
6 individuals, wish to make, or the firm of Montgomery McCracken
7 wishes to make.

8 MR. LIEBESMAN: Your Honor, there are some additional
9 points that we would like to make. I'm happy to make it here
10 or orally. If your Honor would prefer to have a written
11 submission then I would ask leave for the opportunity to do
12 that in light of the nature of the order to show cause.

13 As your Honor knows, we are not here upon motion. The
14 order was issued sua sponte.

15 THE COURT: Let me first find out whether there are
16 any written materials you wish to submit today in response to
17 the order to show cause.

18 MR. LIEBESMAN: Your Honor, there are additional case
19 citations that we would like the Court to consider and the
20 advisory committee notes to Rule 11.

21 THE COURT: Do you have them? Do you want to give
22 them to me orally?

23 MR. LIEBESMAN: I can give them to you orally, your
24 Honor.

25 THE COURT: I have a bunch of other questions to ask

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1 you. Right now the first question is as to written submissions
2 and you're going to give me the case citations orally, is that
3 correct?

4 MR. LIEBESMAN: Yes, your Honor.

5 THE COURT: Now is that true for you, Mr. Palella.

6 MR. PALELLA: Yes, your Honor.

7 THE COURT: Is that true for you, Mr. Pachman?

8 MR. PACHMAN: Yes, your Honor.

9 THE COURT: Do any of you wish to call any witnesses
10 or present any testimony?

11 MR. LIEBESMAN: No, your Honor.

12 MR. PALELLA: No, your Honor.

13 MR. PACHMAN: No, your Honor.

14 THE COURT: Is Montgomery McCracken separately
15 represented here today?

16 MR. LIEBESMAN: No, your Honor. The firm's general
17 counsel has been involved in this process subsequent to the
18 issuance of the order to show cause but the firm itself is not
19 separately represented by counsel.

20 THE COURT: Okay.

21 Does any defendant have anything they either wish to
22 submit or any witness they wish to call with regard to the
23 orders to show cause in this case?

24 MR. CARLINSKY: On behalf of Pinterest, your Honor,
25 no, we do not.

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1 MR. FISCHER: Same on behalf of Mr. Cohen.

2 THE COURT: Then I will give Mr. Liebesman,
3 Mr. Palella and Mr. Pachman and the Montgomery McCracken firm
4 an opportunity to say anything it wishes including citations to
5 case law; anything else you wish to say this is the time to say
6 it.

7 MR. LIEBESMAN: Thank you, your Honor.

8 We are here before the Court, as your Honor mentioned,
9 on the order to show cause issued on March 15th and then there
10 was a subsequent order to show cause issued to the firm itself
11 on March 18th. Because we are not here on a Rule 11 motion
12 initiated by a party in this case it is our position that the
13 heightened standard of bad faith under the Pennie Second
14 Circuit decision which the citation for the record is 323 F.3d
15 86 and it is a March 14, 2003 decision.

16 Your Honor, in 1993 Rule 11 was amended and one of the
17 amendments was to provide a safe harbor provision which did not
18 previously exist. The safe harbor provision was intended to
19 give a party that's being challenged under Rule 11 an
20 opportunity to remedy whatever the alleged deficiency is should
21 the party agree that it be warranted because orders that are
22 issued sua sponte deny a party of the ability to utilize a safe
23 harbor provision or a functional equivalent of a safe harbor
24 provision.

25 THE COURT: Well, do they deny a party the ability to

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1 utilize a safe harbor or is there not a safe harbor created in
2 the case of a sua sponte order?

3 MR. LIEBESMAN: There is not a safe harbor created.

4 THE COURT: Okay.

5 MR. LIEBESMAN: I guess you could say, your Honor,
6 that there is an opportunity to because you could do what we
7 did which was immediately acknowledge well in advance of your
8 Honor's deadline that your Honor was correct. I'm happy to get
9 into how embarrassing this is. I'm happy to get into the
10 effect that this has had with me personally and members of the
11 firm and the firm itself, a firm that has been around for a
12 hundred years, but it is something that we acknowledged
13 immediately. And so, to that extent we believe that we did
14 take steps to remedy it by acknowledging that the Court was
15 correct, the Court lacked subject matter jurisdiction on the
16 basis of there no longer being a diversity of citizenship as of
17 the filing of the amendment to the complaint in late February.

18 So, under the advisory committee notes to the 1993
19 amendments, your Honor, there is a comment that says that since
20 show cause orders will ordinarily be issued only in situations
21 that are akin to a contempt of Court, the rule does not provide
22 a safe harbor to a litigant for withdrawing a claim defense
23 etc. --

24 THE COURT: Slow down. Go ahead.

25 MR. LIEBESMAN: -- after a show cause order has been

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1 issued on the Court's own initiative.

2 I think the critical language that is there in the
3 advisory committee notes which the Pennie Second Circuit court
4 picked up on and other courts subsequent here in the Southern
5 District of New York be akin to contempt. And while the
6 mistake, an honest oversight that was made by my firm and I
7 take full responsibility, it did not rise to the level of
8 contempt of Court.

9 THE COURT: When you say mistake, what are you
10 referring to?

11 MR. LIEBESMAN: The failure to realize that by adding
12 Skoop -- aside from the LLC with the individual members,
13 dealing with Skoop itself which is easy, it is a Delaware
14 corporation -- by adding Skoop as an additional plaintiff by
15 way of the amended complaint on February 28th we lost
16 completely diversity because Pinterest, while it is
17 headquartered in California so, your Honor, we think of it as
18 California, but it is incorporated in the State of Delaware
19 just as is Skoop -- Skoop Media Associates is the formal name
20 of that plaintiff. So that was the mistake, your Honor, by not
21 realizing that, that was --

22 THE COURT: Well, my order points out that that was
23 not the only shortcoming. The complaint failed to allege the
24 citizenship of plaintiff Schroeder. It failed to allege the
25 citizenship of Defendant Brian Cohen. It failed to allege the

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1 principal place of business of Plaintiff Skoop Media
2 Associates. It failed to allege the citizenship of the natural
3 persons and any entities who are members of Rendezvoo LLC. It
4 did all that separate and in addition to the inclusion of two
5 Delaware corporations, one as plaintiff, one as defendant
6 corporation. I don't hear you addressing them.

7 MR. LIEBESMAN: Okay. I'm happy to, your Honor.

8 THE COURT: Well, I'm not asking you to, I just don't
9 hear you addressing them. I hear you describing this mistake
10 as adding a plaintiff Delaware corporation and a defendant
11 Delaware corporation and I think the order to show cause is
12 much broader than that. That's why I'm curious to hear you
13 characterize it as a mistake in this one limited respect.

14 MR. LIEBESMAN: Okay, if your Honor understood that
15 from me to mean that was the only mistake made, that is not
16 correct. The Court is absolutely correct on the other issues
17 it had raised. The reason why I focus on the issue of adding
18 Skoop in the amended complaint is because it goes to the heart
19 of this Court's subject matter jurisdiction or the lack
20 thereof.

21 The other points are very valid, residence and
22 citizenship is not synonymous. Understood. No debate about
23 that. That, however, if the initial complaint were -- if this
24 were recognized when the initial complaint was made, it could,
25 your Honor, arguably be an easy fix. We amended the complaint

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1 to substitute citizenship for the word "residents" in both of
2 case of Mr. Schroeder who is a citizen of New Jersey and
3 Mr. Cohen who is a citizen of New York. I think one reason why
4 the defendants didn't bring it up on their own when the initial
5 complaint was filed in late December is because in
6 understanding that there was complete diversity at the time we
7 were incorrect in using the word "residents" but they could
8 just as easily be replaced with the word "citizenship" and the
9 Court would have, at that time, retained subject matter
10 jurisdiction. The distinction that I'm making is that this
11 goes to the heart of this Court's jurisdiction, that being it
12 can't be remedied, there is no complete diversity anymore.

13 THE COURT: What about the failure to allege the
14 principal place of business of Skoop?

15 MR. LIEBESMAN: Well, your Honor, that's correct, we
16 did not allege the principal place of business of Skoop. One
17 of the issues that your Honor may be aware of from the letter
18 writing campaign is that the parties involved in this process,
19 there are a total of four individuals, there were three
20 Columbia law students that really came up with the idea that
21 became Pinterest. They brought in what they expected to be a
22 sophisticated venture capitalist, that's defendant Cohen.
23 Defendant Cohen joins this group, loves the idea, expresses his
24 love of the idea, it is Mr. Schroeder's idea, no one is going
25 to dispute the fact he lived and breathed this and spent

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1 thousands of hours developing the idea and writing code, but
2 after he developed a personality conflict with Mr. Schroeder he
3 took the idea and gave it to the people that eventually founded
4 it, Pinterest. In so doing they continued to ignore all the
5 corporate formalities of Rendezvoo, the prior LLC, and Skoop.

6 So, Skoop, while the party, Mr. Schroeder circulated a
7 termination agreement to try to create some formality to
8 terminate Skoop as a viable entity, Mr. Cohen just didn't even
9 respond to the efforts to do that. Why? Because part of the
10 termination provided that you would not take any of the ideas
11 and give them to anybody else. Mr. Cohen probably by then had
12 already done that and that, I think, will be born out in
13 discovery but there is little dispute that Mr. Cohen is on both
14 sides, works with Mr. Schroeder, takes the idea and all of a
15 sudden becomes the first investor in Pinterest.

16 So, your Honor, what is the principal place of
17 business of Skoop? Skoop exists, it is a Delaware corporation,
18 it exists but not more than that. It doesn't engage in
19 business since Mr. Cohen, the defendant deadlocked the company
20 and just everything went -- they all went their way, they
21 didn't know he was going to take their idea and go his own way
22 himself.

23 THE COURT: But this is a court of limited
24 jurisdiction. You are electing to include Skoop as a party.
25 Now, Skoop may be a shell, there may be nothing to Skoop. It

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1 may not do anything but you're electing to make it a party to
2 this action and you're invoking the jurisdiction of this Court
3 and Section 1332 could not be more plain as to what it requires
4 if you seek to invoke the jurisdiction of the Court with
5 respect to a corporation.

6 MR. LIEBESMAN: Your Honor, the only thing I would say
7 to that is we are not looking to seek to invoke the
8 jurisdiction of this Court in the present tense. We have
9 acknowledged that by joining Skoop as a plaintiff in the case
10 when we amended the complaint in late February this Court lost
11 the subject matter jurisdiction and that was a point that we
12 raised immediately with your Honor well in advance of a
13 deadline to say the Court is correct, there is no subject
14 matter jurisdiction, and we are not opposed to the entry of an
15 order dismissing the case for lack of subject matter
16 jurisdiction so we're not looking to continue to invoke the
17 jurisdiction of this Court.

18 THE COURT: Yes, but so the record is clear, when you
19 say you raised it immediately you raised it immediately after
20 the defects, the several defects were called to your attention.

21 MR. LIEBESMAN: Absolutely, your Honor.

22 THE COURT: And what about the allegations with regard
23 to Rendezvoo LLC and the failure to allege the citizenship of
24 the members of the LLC?

25 MR. LIEBESMAN: Again, your Honor, the Court is

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1 correct, we did not allege the citizenship of any of the
2 members of the LLC; I'm not sure if we did which is why I focus
3 on Skoop. I'm not a hundred percent sure if we did that that
4 would have defeated the subject matter jurisdiction because
5 there is one member who I'm not sure what state he is a citizen
6 of. But, the Court is correct. I don't know what to say, your
7 Honor. It is embarrassing. It is an oversight that cannot be
8 explained.

9 THE COURT: But the point of the inquiry is in
10 endeavoring to look at the objective reasonableness of the
11 conduct. It seems to me that it may be of some bearing if it
12 is a single error in isolation rather than a pattern of errors
13 in the same pleading that would bear some relevance here. I
14 would think that would be a relevant indication here of the
15 level of care and attention paid to invoking the jurisdiction
16 of the Court. One error in isolation may look differently if
17 it is coupled with a host of other errors. That's the only
18 thing.

19 MR. LIEBESMAN: Your Honor, and just so the record is
20 clear, it is our position that the test -- the standard to be
21 applied is not objective reasonableness. It is bad faith based
22 on the Pennie decision.

23 THE COURT: Well, I will take a look at the Pennie
24 decision and --

25 MR. LIEBESMAN: Sorry, your Honor; there is one other

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1 cite I wanted to get on the record. Maybe now is a good time?

2 THE COURT: Yes. Please.

3 MR. LIEBESMAN: And there are other cases it is Brous
4 & Company.

5 THE COURT: B-R-O-U-S.

6 MR. LIEBESMAN: It is unreported Westlaw, 2004 Westlaw
7 1367451 and that's a June 16, 2004 decision subsequent to the
8 Pennie.

9 THE COURT: Of what court?

10 MR. LIEBESMAN: The Southern District of New York,
11 your Honor; Judge Haight.

12 THE COURT: And the date of the decision?

13 MR. LIEBESMAN: June 16, 2004.

14 THE COURT: Now, is it your position, therefore, that
15 the improper invocation of diversity jurisdiction can never be
16 the subject of a Rule 11 sanction if raised sua sponte.

17 MR. LIEBESMAN: Absolutely not. That's one of the
18 reasons we didn't voluntarily dismiss because we didn't want it
19 to appear to the Court that we were trying to avoid your
20 Honor's analysis and evaluation pursuant to its order to show
21 cause.

22 THE COURT: Well, under the standard you're urging
23 that it be akin to contempt, how then could the invocation of
24 faulty invocation of subject matter jurisdiction ever be akin
25 to contempt of Court? I don't get it.

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1 MR. LIEBESMAN: For that question I think I would
2 agree with your Honor. I mean, I don't think that it could be
3 viewed as an act of contempt so long as the bad faith standard
4 is met. So, if an attorney exercises bad faith intending to be
5 in this court and hoping that the Court wouldn't catch a
6 mistake or one of the parties filed a case, then I think the
7 Court could then say that's bad faith, that's contempt of
8 Court. But I think, your Honor, if there is no finding of bad
9 faith, I think I would have to agree that in this limited
10 circumstance there may not be contempt of Court but, your
11 Honor, I would like to keep this focused on the case here
12 because there may be other scenarios that I'm not thinking
13 about.

14 THE COURT: Would you agree that if the standard is
15 lack of objective reasonableness there is no objective
16 reasonableness in the position taken with regard to the
17 pleading here, that the pleading itself was not objectively
18 reasonable? Would you agree if the objective reasonableness
19 standard applies?

20 MR. LIEBESMAN: Your Honor, if the objective
21 reasonableness standard applies it is still my position -- our
22 position that that standard has still not been met because
23 while there may be more than one instance of there being
24 questions about the allegations in the parties section of the
25 complaint so this is not questioning allegations that are made

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1 throughout the entire complaint, it is the parties section that
2 were not described in a way --

3 THE COURT: It is the subject matter jurisdiction
4 section.

5 MR. LIEBESMAN: Right. It is the subject matter
6 jurisdiction section.

7 THE COURT: A rather critical portion, you would
8 agree?

9 MR. LIEBESMAN: I absolutely agree, your Honor. But I
10 think that Rule 11 and the associated fallout from any Rule 11
11 sanction, when you're dealing with an honest oversight such as
12 we have here limited to the question of subject matter
13 jurisdiction, I still believe as we say in our letter, that we
14 would meet -- if that were to be the test, that we did meet
15 that and that we would ask the Court not to invoke any
16 sanctions under Rule 11.

17 THE COURT: Well, how would you assert that the
18 allegations of the complaint are objectively reasonable? Let
19 me hear you on that. Now, I can understand you saying, well,
20 even if not objectively reasonable there are reasons why you
21 ought not sanction us but confining yourself to the argument
22 which I understand you to urge that it was not objectively
23 unreasonable to argue in your pleading or assert in your
24 pleading that with a plaintiff corporation and a defendant
25 corporation alleged to be citizens of the same state that that

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1 pleading was not objectively unreasonable in its invocation of
2 the Court's diversity jurisdiction.

3 MR. LIEBESMAN: Well preliminarily, your Honor, I
4 think I respond to that to pointing out something that your
5 Honor sort of caught yourself saying. The plaintiff's arguing
6 versus alleging. We are not arguing. We are not perpetuating
7 the argument that this Court has subject matter jurisdiction.
8 Yes, we did allege it. As soon as the Court pointed out that
9 there were these errors we quickly acknowledged so we are not
10 perpetuating and I think that goes towards objective
11 reasonableness. It also goes towards the reason why there is a
12 safe harbor. It gives the party the opportunity to see the
13 light and take affirmative action to remedy any deficiency.
14 But, your Honor, I don't think it can be the case that a
15 mistake can be, in and of itself, objectively unreasonable.

16 THE COURT: Okay. So an allegation in the complaint
17 in order to determine whether it is objectively reasonable or
18 not, you don't look at the four corners of what you've alleged,
19 you look at degree of remorse and remedial measures after the
20 fact on the narrow question of objective reasonableness?

21 MR. LIEBESMAN: Your Honor, I think those are some but
22 not all of the factors. I think you have to put this in
23 context, that you are talking about Rule 11 sanctions, and if
24 there is to be the law that any mistake in pleading subject
25 matter jurisdiction which I'm sure this happens on occasion,

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1 will automatically result in Rule 11 sanctions because it could
2 never be objectively reasonable.

3 THE COURT: Are Rule 11 sanctions required under the
4 objective reasonableness standard if a pleading is not
5 objectively reasonable? Is a Court required to impose Rule 11
6 sanctions?

7 MR. LIEBESMAN: I think Rule 11 provides the Court
8 with sufficient discretion to make whatever finding.

9 THE COURT: All right. So, one could find that a
10 position was not objectively reasonable but yet decline to
11 impose Rule 11 sanctions because other mitigating or equitable
12 circumstances have been presented.

13 MR. LIEBESMAN: I would agree with that, your Honor.

14 THE COURT: But those mitigating circumstances would
15 not bear on whether it was objectively reasonable. One would
16 first look at the objective reasonableness of the position
17 taken by the attorney in the pleading or in oral statements and
18 then after assessing the objective reasonableness, then turn to
19 a different question whether there are equitable or mitigating
20 circumstances which may call upon the Court not to impose
21 sanctions.

22 MR. LIEBESMAN: Your Honor, I do think, though, that
23 some of the issues can still go to objective reasonableness.
24 For example --

25 THE COURT: You are not conflating the two standards?

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1 MR. LIEBESMAN: I don't think so, your Honor.

2 THE COURT: I see.

3 MR. LIEBESMAN: Because it is not strict liability, it
4 is objective so it is objective versus subjective.

5 THE COURT: That's what I just finished saying, is
6 that determining that something was objectively unreasonable
7 does not require, therefore I'm asking you whether it requires
8 the imposition of sanctions and you urge that it does not.
9 That makes it not strict liability but the determination of
10 objective reasonableness is a step along the way.

11 MR. LIEBESMAN: Your Honor, two responses.

12 I would still say it is strict liability by making a
13 finding. You may not impose the Rule 11 sanctions. I think it
14 goes to the distinction between strict liability and damages.
15 If there is a strict liability finding you were negligent but
16 there were no damages we are not going to impose Rule 11
17 sanction. I do still think that if there is any mistake made
18 that it is automatically deemed objective reasonableness and
19 the sole question is for the Court to decide whether or not to
20 impose sanctions under Rule 11. I still think that's a finding
21 of strict liability, it is a question of what are the damages.
22 Are you going to be found liable on Rule 11 and sanctioned
23 under Rule 11 or not.

24 But, your Honor, as an example, I don't know how many
25 times there are complaints filed in this court where instead of

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1 using the word "citizen" the plaintiff's lawyer uses the word
2 "residents." I don't know. I have seen the cases. I know it
3 has happened. I have seen articles written about warning
4 they're not synonymous which we are not arguing that they are.
5 So, what if 10 percent of the complaints filed in this court
6 have some mistake as to subject matter jurisdiction and let's
7 take the resident versus citizenship. Could it then be said if
8 that were the sole issue that that would then be objectively
9 unreasonable when a good portion of the complaints that are
10 filed contain the same mistake. And that's all it is, is a
11 mistake. Let's say that there is no bad faith or any other
12 question about that. Again, I go back to your Honor doesn't
13 have to impose sanctions under Rule 11 but a finding of
14 objective reasonableness would be a finding made under Rule 11;
15 it is why we are here, with all due respect. The effect of a
16 finding of objective unreasonableness, whether or not Rule 11
17 sanctions were imposed.

18 THE COURT: But you urge that your pleading is
19 objectively reasonable. Is that what you urge?

20 MR. LIEBESMAN: I urge, your Honor, that we made an
21 honest mistake, that it was an oversight that does not rise to
22 the level of objective unreasonableness under the context of
23 Rule 11.

24 THE COURT: Well, that would make your pleading
25 objectively reasonable then or not objectively unreasonable,

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1 correct?

2 MR. LIEBESMAN: I would say so, your Honor. It can't
3 be the case, your Honor, that if there is a mistake whether it
4 is subject matter jurisdiction or otherwise, that you run the
5 risk of being found to be objectively unreasonable if it is a
6 mistake.

7 THE COURT: I see.

8 So, in assessing Rule 11 I should ask the question:
9 Is the allegation objectively unreasonable? and then ask the
10 question: Was it the product of mistake? And if it was the
11 product of mistake then it cannot be objectively unreasonable,
12 correct?

13 MR. LIEBESMAN: That would tend towards a finding of
14 it not being objectively unreasonable and I think, your Honor
15 as I pointed out in my letter for what it is worth, defense
16 counsel, a lot of lawyers missed this and it is embarrassing.

17 THE COURT: Missed what?

18 MR. LIEBESMAN: Missed the fact that "resident" was
19 used instead of "citizenship" and that Skoop, because it is a
20 Delaware corporation, defeated subject matter jurisdiction --
21 complete diversity because Pinterest is also a Delaware
22 corporation.

23 THE COURT: Well now let's now conflate issues, okay?
24 Let's not conflate issues.

25 If you want to urge on this Court that a lot of

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1 lawyers used the word "residents" instead of "citizenship" I'm
2 all ears. I know it has happened. But, if you want to urge on
3 this Court that a lot of lawyers invoke diversity jurisdiction
4 in a pleading in which they allege that a plaintiff corporation
5 is a citizen of Delaware and a defendant corporation is a
6 citizen of Delaware and we're not dealing with something like
7 CAFA which only requires minimal diversity, not complete
8 diversity, I respectfully ask you to support your claim with
9 some examples because I've only been doing this for 10 years
10 and I'm happy to say that I have not observed, with any
11 frequency, members of the bar alleging that a plaintiff is the
12 citizen of the same state as a defendant expressly in their
13 pleading and maintaining that there is diversity jurisdiction.

14 So, perhaps my experiences have been aberrational and
15 I look forward to your enlightening me as to the frequency as
16 to which you believe this happens in this Court.

17 MR. LIEBESMAN: Your Honor, that was not the point
18 that I was making, with all due respect, your Honor.

19 I do understand or believe that that probably never,
20 if ever happens --

21 THE COURT: Well, it happened here.

22 MR. LIEBESMAN: Right, it happened here, but the only
23 reason why, your Honor, that I bring that point up is just
24 because we were having this discussion about objective
25 reasonableness and while we made the mistake, it was an honest

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1 mistake, it was something that was overlooked on our part but
2 it was something that was overlooked as well by defense
3 counsel. So, I think it just goes to objective reasonableness.

4 Again, we are talking about the subject matter
5 jurisdiction portion of a complaint and you're right, perhaps
6 people take it for granted that those sections are drafted
7 properly and you see the word "resident," you think
8 citizenship, whatever the case may be, but I only bring that
9 point up because I think it goes to whether or not there is
10 objective reasonableness.

11 THE COURT: Well, Quinn Emanuel representing Pinterest
12 takes a somewhat different viewpoint. They say, oh, we knew
13 that both the plaintiff corporation and the defendant
14 corporation were alleged to be Delaware corporations but we
15 decided that instead of invoking the Court's lack of subject
16 matter jurisdiction we were going to urge the Court to reach an
17 issue of whether or not the Court had authority or whether the
18 plaintiff had authority to institute a suit on behalf of the
19 entity. Where is the showing of authority beyond the
20 plaintiff's signature on the pleading that he represents the
21 entity just as defendant's counsel signed a pleading
22 representing that they were authorized to do so by Pinterest?
23 Where is there more from the plaintiff than that representation
24 by plaintiff's counsel at the conclusion of the pleading? And
25 where does this entity have a cognizable injury under Article

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1 III? The Court should sidestep the lack of diversity
2 jurisdiction to reach these issues which will have value to my
3 client because we will be able to argue that this was a ruling
4 on the merits and stop you from filing -- stop the plaintiffs
5 from filing suits in other courts?

6 So, I don't think it is accurate to say that in the
7 case of Pinterest that they were unaware of the Court's lack of
8 subject matter jurisdiction because there was no diversity.
9 They appear to have been aware of it and refrained from raising
10 it. That's a different issue of which this Court is well
11 aware.

12 MR. LIEBESMAN: That may be the case, your Honor.

13 THE COURT: Anything else?

14 MR. LIEBESMAN: Unless your Honor has any other
15 questions, I don't think so.

16 THE COURT: All right.

17 Mr. Palella, anything?

18 MR. PALELLA: No, your Honor. I have nothing to add
19 other than to individually apologize to the Court.

20 THE COURT: Mr. Pachman, anything.

21 MR. PACHMAN: Your Honor, I would like to add to that
22 apologies on my individual behalf as well.

23 THE COURT: All right.

24 Does any defendant have anything they wish to say?

25 MR. CARLINSKY: Your Honor, I just would like to

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1 respond to the point that your Honor just raised about we were
2 aware but failed to raise it.

3 With respect --

4 THE COURT: I think elected not to raise it might be a
5 more appropriate way to describe it.

6 MR. CARLINSKY: Well, with respect, your Honor, the
7 way we elected to raise it was to point out that we believed --
8 and we put it in our letter -- we believed that the addition of
9 those corporate plaintiffs was improper and we believe and
10 still believe and respectfully submit that under the law the
11 Court could look to whether the addition of those two corporate
12 plaintiffs was proper or, in effect, fraudulent, a fraudulent
13 type of amendment that would have the effect of defeating
14 diversity.

15 THE COURT: No, no, no, no. The Court should, despite
16 the face of the pleading reflecting a lack of diversity, you
17 urge that the Court ignore that and go on to a further inquiry.

18 Do you not, Mr. Carlinsky?

19 MR. CARLINSKY: We do. Yes, your Honor.

20 THE COURT: Okay. That's what I thought.

21 MR. CARLINSKY: And if I could just add, the situation
22 that we typically see is where a plaintiff files a suit in
23 State Court and facially there is no diversity but a defendant
24 removes, nevertheless to Federal Court, claiming that although
25 facially if you literally just looked at the constellation of

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1 the parties, there would be no diversity but, nevertheless, the
2 defendant raises the argument that the inclusion of a party was
3 done in a sham sort of way in order to defeat diversity
4 jurisdiction.

5 I think this really has a close parallel to that and
6 our point in reading this and in fact in specifically pointing
7 out, I mean our letter, your Honor, says that the issue of
8 Schroeder's apparent lack of authority to add the two companies
9 as co-plaintiffs is a threshold issue of subject matter
10 jurisdiction that must be resolved now. The point we were
11 making --

12 THE COURT: No. That's a factual inquiry, correct?

13 MR. CARLINSKY: Yes, your Honor.

14 THE COURT: Okay. So you urge, Mr. Carlinsky, as a
15 member of the bar of this Court, that the Court sidestep the
16 face of the pleading which demonstrates lack of subject matter
17 jurisdiction but continue on and allow the submission of either
18 factual evidence or depositions, discovery, going to the
19 question of the authority of the entity to file suit and reach
20 that question rather than the question that appears on the face
21 of the pleading.

22 Isn't that correct, Mr. Carlinsky?

23 MR. CARLINSKY: Yes, your Honor. We did.

24 THE COURT: Okay. That's what I thought.

25 MR. CARLINSKY: And again I would add, I think that

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1 based on the law as I understand it, the Court can always
2 determine its subject matter jurisdiction. We believe, and I
3 continue to believe, your Honor, that the addition of those two
4 plaintiffs, if the Court wished to -- again the plaintiff can
5 always file a Rule 41 dismissal which they haven't, but we
6 continue to believe, your Honor, that the Court can look at
7 this issue just like it could look at a facially -- a complaint
8 that is removed that on its face does not plead complete
9 diversity.

10 THE COURT: And why would it be a provident exercise
11 of discretion if it is discretionary for this Court to overlook
12 the facial lack of diversity to reach the factual question of
13 whether or not the law firm that signed the pleading as counsel
14 for the entity was in fact authorized to sign the pleading as
15 counsel for the entity?

16 MR. CARLINSKY: Well, the issue of the Court's
17 discretion is an issue of the Court's discretion.

18 THE COURT: No. I asked you why would it be a
19 provident exercise of discretion. That's my question for you,
20 Mr. Carlinsky.

21 MR. CARLINSKY: Because we have now been in front of
22 the Court and the Court has some familiarity with the case
23 acknowledging that it is early on in the case. But, I also
24 come back to remember what the original complaint alleged so
25 what we had in the original complaint was purely an allegation

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1 that this was the plaintiff's and the plaintiff's only case
2 claim rights, etc. We then have an amendment, an amendment
3 that all of a sudden adds these two corporate plaintiffs but
4 still does not allege that these plaintiffs suffered injury, in
5 fact owned any of the rights in question, number one, and
6 despite outside of the court our correspondence asking the
7 plaintiff to articulate the basis is there authority for these
8 plaintiffs to be added we received no response.

9 THE COURT: Mr. Carlinsky, have you had much success
10 with trying this approach, you or your firm, in other federal
11 courts around the country where a case, on its face, has no
12 diversity jurisdiction but you prefer the Court to reach issues
13 of authority, case or controversy, or the like?

14 MR. CARLINSKY: I have -- that's a tough question,
15 your Honor. I have a similar issue right now in a case in
16 California but --

17 THE COURT: A federal court?

18 MR. CARLINSKY: A federal court where the defendant --
19 I don't know that there is a case that aligns like this one,
20 your Honor, quite candidly, where the plaintiff has later
21 amended to allege or add plaintiffs that defeat diversity but
22 the law in the case I have in California is a factual challenge
23 to subject matter jurisdiction.

24 THE COURT: Do you practice much in federal court,
25 Mr. Carlinsky?

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1 MR. CARLINSKY: I do, your Honor.

2 THE COURT: Okay.

3 MR. CARLINSKY: I do.

4 All I'm saying is in no way shape or form were we
5 attempting to not advise the Court that there is a subject
6 matter jurisdiction issue. I mean, I think that is reflected
7 in our letter and it is also to say to the plaintiff we don't
8 understand with the way you've pleaded your complaint how there
9 is subject matter jurisdiction but we don't accept that the
10 addition of these two plaintiffs was proper. And it looked to
11 us, your Honor, with respect, as an attempt to get out of this
12 Court, rightfully or wrongfully, and all we were trying to do
13 was to bring to the Court's attention that should the Court
14 wish this comes back to the Court's discretion. Should the
15 Court wish we believe that there can be mounted a factual
16 challenge to whether or not the allegations -- what the law
17 says is where there is a factual challenge the Court is to
18 disregard the truthfulness or veracity of the allegations of
19 jurisdiction.

20 THE COURT: I have read 12(b)(1) and the case law
21 thereunder, Mr. Carlinsky. Thank you.

22 MR. CARLINSKY: Very well. Thank you.

23 Is there anything else I can answer for the Court? I
24 just want to make it clear, again, it was our intent to just
25 raise the issue so that it could be properly addressed.

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1 THE COURT: If the Court wanted to kind of thing.

2 MR. CARLINSKY: Yes, your Honor.

3 THE COURT: That's what you asked me -- when I go back
4 and reread your letter, as I will, I'm going to take away that
5 you're being helpful in bringing this to the Court's attention
6 in case the Court wanted to address it.

7 MR. CARLINSKY: I would go one step beyond that.

8 THE COURT: Yes.

9 MR. CARLINSKY: I would say what we were doing was
10 raising it because we think it is appropriate for there to be a
11 factual determination as to the validity of the allegations
12 regarding these two named plaintiffs and their inclusion in the
13 case and that's a point we were trying to raise, that so that
14 the Court can determine its jurisdiction the first issue that
15 we needed to address was whether it was proper, the propriety
16 of adding these two named plaintiffs.

17 THE COURT: You agree there is no subject matter
18 jurisdiction in this court, correct?

19 MR. CARLINSKY: I don't agree with that your Honor.

20 THE COURT: You think there is subject matter
21 jurisdiction in this court?

22 MR. CARLINSKY: I think there could be subject matter
23 jurisdiction in this court.

24 THE COURT: I see.

25 MR. CARLINSKY: I think that goes back to the factual

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1 challenge question. Now, of course the Court has the
2 discretion to say I'm not accepting the invitation, in essence,
3 to look at the question, but I do think the Court can find
4 subject matter jurisdiction just like when you have that -- the
5 analogy I was analogizing to just like when you have a pleading
6 that comes up that facially does not plead complete diversity.
7 The Court there, of course, will look at it is brought on by
8 motion. I don't have to tell your Honor, your Honor knows
9 this, but I don't think there is any real difference here in
10 the way in which this issue now is before the Court should the
11 Court decide to look at this factually. On the other hand it
12 doesn't have to and as I said, the plaintiff always here, I
13 can't think of a reason why --

14 THE COURT: But you urge me to do this so that I
15 would, at your urging, then say there is no subject matter
16 jurisdiction?

17 MR. CARLINSKY: No. Just the opposite, your Honor.
18 Just the opposite, your Honor. I'm urging, I think,
19 collectively we're urging that if the Court were to find that
20 these plaintiffs which we don't believe are properly now in the
21 case because the allegations are no interest, no harm and now
22 clearly no demonstration of the authority, your Honor could say
23 these plaintiffs were added effectively as a sham, I'm going to
24 eliminate them, disregard them, and therefore diversity would
25 exist.

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1 THE COURT: What is your demonstration of authority on
2 your pleading on behalf of Pinterest?

3 MR. CARLINSKY: I haven't submitted a pleading, but in
4 terms of the letters we have asked for any demonstration of
5 authority. We've corresponded --

6 THE COURT: What is yours?

7 MR. CARLINSKY: I'm sorry?

8 THE COURT: What is yours?

9 MR. CARLINSKY: In terms of our --

10 THE COURT: You signed a letter to me representing
11 that you're counsel for defendant Pinterest. What is yours?

12 MR. CARLINSKY: My representation that I represent
13 Pinterest.

14 THE COURT: Well, that's what I have from the
15 plaintiffs.

16 MR. CARLINSKY: It hasn't been challenged.

17 THE COURT: Mr. Carlinsky, that's what I have from the
18 plaintiffs.

19 MR. CARLINSKY: But the difference I would submit,
20 your Honor, is that our jurisdiction -- I'm sorry our
21 authority, with all respect, has not been challenged, just like
22 the plaintiffs -- the original plaintiffs and their
23 representation by the law firm was not something that we
24 challenged. It was only the inclusion of these two corporate
25 entities which we understand again we are strangers to the

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1 transaction but we understand there were these entities. It is
2 now pleaded. If the entities observed the rights there may be
3 conflict with the plaintiff so we raise that question but it
4 was only in the context -- if there is a challenge to my
5 authority I'm happy to get from the general counsel, the board
6 of directors what needs be done to make that demonstration, but
7 I don't understand there to be any challenge. Here there is
8 and there is a challenge, not just we're challenging for the
9 sake of challenging but what we have is an initial complaint
10 that alleges one thing, we then have a subsequent complaint
11 that alleges something quite different and conflict or tension
12 between those plaintiffs and a belief, at least as I understand
13 it from the allegations, that Mr. Cohen never authorized the
14 filing of the suit on behalf of the entities. So, there is a
15 good faith basis for challenging the authority.

16 That's my answer, your Honor, but I'm happy to
17 demonstrate that we have been retained. I can submit my
18 engagement letter but there hasn't been any challenge. And I'm
19 not challenging the authority of the plaintiff's counsel to
20 represent Mr. Schroeder.

21 THE COURT: Thank you.

22 Mr. Fischer or Mr. Bart, anything to add?

23 MR. FISCHER: No, your Honor.

24 THE COURT: All right. Thank you, all. Thank you,
25 all, for coming in, and I will issue a decision shortly.

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I appreciate it.

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